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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-849

GARY ROCCO GARRAMONE,
ROBERT J. LUMIO,
ALBERT JOSEPH CATALANO, JR.,
EMILIO JOSEPH TRAMONTINA, JR.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners, GRAY ROCCO GARRAMONE, ROBERT J. LUMIO, ALBERT JOSEPH CATALANO, JR., and EMILIO JOSEPH TRAMONTINA, JR., respectfully pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 13, 1974.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit, not yet reported, appears in the Appendix hereto. The judgments of the convictions entered by the United States District Court for the Eastern District of Pennsylvania, following a trial before the Honorable Louis C. Bechtle, United States District Court Judge, Eastern District of Pennsylvania, without a jury, appear in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 13, 1974. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

1. Whether the Trial Court erred in denying Petitioners' Motion to Suppress for the reason that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. § 2510 et seq.) is unconstitutional as it relates to electronic surveillance.

STATUTES INVOLVED

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 is codified in 18 U.S.C.

§ 2510-2520. The text of those portions of the Statute authorizing electronic surveillance (18 U.S.C. § 2516 and § 2518) appear in the Appendix hereto.

STATEMENT OF THE CASE

The Petitioners, GARY ROCCO GARRAMONE, ROBERT J. LUMIO, ALBERT JOSEPH CATALANO, JR., and EMILIO JOSEPH TRAMONTINA, JR., were indicted by a Federal Grand Jury in Philadelphia, Pennsylvania, on November 14, 1973. The two-count indictment charged Petitioners with a conspiracy to violate 18 U.S.C. § 1952, being a violation of the interstate gambling laws, in violation of 18 U.S.C. § 371, and Petitioners GARY ROCCO GARRAMONE, ALBERT JOSEPH CATALANO, JR., and EMILIO JOSEPH TRAMONTINA, JR. with a violation of 18 U.S.C. § 1952, being the use of a facility in interstate commerce with the intent to carry on or facilitate the carrying on of an unlawful gambling business. Following a trial on stipulated facts and testimony before the Honorable Louis C. Bechtle, United States District Court Judge, Eastern District of Pennsylvania, without a jury, Petitioners were found guilty as charged in the indictment and were sentenced to probation and Ordered to pay fines.

Prior to their trial, Petitioners filed a Motion to Suppress the Contents of Intercepted Wire Communications raising the issue herein raised, which was denied by the Trial Court on March 4, 1974. (A copy of the Opinion of the Trial Court appears in the Appendix hereto).

The stipulated facts and testimony which formed the basis of the evidence presented at the trial relied heavily upon evidence derived from a Court-Ordered electronic surveillance, of a telephone subscribed to by Petitioner GARY ROCCO GARRAMONE. Transcripts of conversations intercepted pursuant to this electronic surveillance were admitted by stipulation. Evidence derived from a touch-tone decoder device which recorded a record of outgoing numbers dialed from this telephone was also a part of the stipulated evidence.

On appeal, the United States Court of Appeals for the Third Circuit affirmed Petitioners' convictions, specifically denying their contention herein raised as to the unconstitutionality of the Statutes involved.

REASONS FOR GRANTING THE WRIT

I.

THE TRIAL COURT ERRED IN DENYING PETITIONERS' MOTION TO SUPPRESS IN THAT TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 (18 U.S.C. §2510 ET SEQ.) IS UNCONSTITUTIONAL AS IT RELATES TO ELECTRONIC SURVEILLANCE.

It is submitted that upon the passage of Title III of the Omnibus Crime and Safe Streets Act of 1968 (18 U.S.C. §§2510-2520) the startling and horrifying possibility that our national community may be on the verge of rejecting its most fundamental democratic ideals in favor of the fearsome restrictions of a repressive fascist-like state came closer to reality.

On every side, we see the steadily mounting evidence of the impending destruction of those rights and liberties which the Framers of the Constitution were so convinced would create, sustain and perpetuate on these shores a free and open society unlike any other on the face of the globe.

Concededly, electronic surveillance is but one example of the rapidly spreading neo-fascism that is threatening to destroy us as a community of free people. But it illustrates, in dramatic fashion, the spectacle of men in high places vociferously demanding the paradoxical power to save freedom by destroying its most precious concepts: C.f. *Task Force Report: The President's Commission on Law Enforcement and Administration of Justice*, Appendix C (1967), pp. 92-95 In this area alone, the rampant invasion of our constitutional safeguards has so seriously shaken the confidence of millions of Americans, be they public or private, in the sanctity of their telephone communications that no one, consciously or subliminally, can be sure that there is not a third ear present at every such conversation.

Only the immediate intervention of this Court can serve notice upon all concerned that this "dirty business" (*Olmstead v. United States*, 277 U.S. 438, 575 (1928)) shall cease forthwith and, along with it, every related threat, overt or covert, to the existence of our nation as its Founders so fervently envisioned it to be.

It can never be forgotten, even for a moment, that liberty is rarely lost overnight but by the cumulative effect of a succession of disregarded affronts. As one leading newspaper so eloquently and pointedly

editorialized in commenting on the very issue before this Court, "Tyranny, like fog, can come creeping in on cat's feet. It comes little by little, chipping away at this freedom and chivvying that right. It adopts the habits and practices of a police state while blandly assuring everyone that no police state exists. It intimidates in the name of 'fairness' and denies that conformity and obedience are what are really desired." (*The New York Times*, May 2, 1971, Sec. 4, p. 14). To ignore this warning is to court the dark whirlwind that, in 1933, overwhelmed first the Weimar Republic, and then the rest of the world. (C.f. *Brief in Opposition to Certiorari, United States v. United States Dist. Ct.*, 407 U.S. 297 (1972).

A. TITLE III IS VIOLATIVE OF THE FIRST AMENDMENT

1. Title III has an unconstitutional chilling effect on free speech. *NAACP v. Button*, 371 U.S. 415 (1963), *Dombrowski v. Pfister*, 380 U.S. 479 (1965), *Younger v. Harris*, 401 U.S. 37 (1971), *Griswold v. Connecticut*, 381 U.S. 479 (1964).

2. Title III unconstitutionally inhibits the right freely to receive speech. *Lamont v. Postmaster General*, 381 U.S. 301 (1964), *Cook v. United States*, 401 U.S. 996, Cert. Den. (1971) per Douglas, J., citing *Westin*, "Privacy & Freedom", pp. 365-366 (1971).

B. TITLE III IS VIOLATIVE OF THE FOURTH AMENDMENT

1. Title III fails to satisfy the Fourth Amendment's requirement of "particularity" both as to the place to be searched and the things to be seized, *Chimel v. California*, 395 U.S. 752 (1969); *Spitzer, Electronic Surveillance by Leave of the Magistrate; The Case in Opposition*, 118 U.Pa.L.Rev. 169, 181, n. 67 (1969); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Katz v. United States*, 389 U.S. 347 (1967); and *Warden v. Hayden*, 387 U.S. 294 (1967).

2. Title III, through its durational latitude, violates the Fourth Amendment. *Berger v. New York*, 488 U.S. 41 (1966).

C. TITLE III VIOLATES THE FIFTH AMENDMENT

1. Title III denies the due process of law to conversants not named in the authorization for interception. *Miranda v. Arizona*, 384 U.S. 436 (1965); *Gideon v. Wainwright*, 372 U.S. 335 (1962); and *Goldberg v. Kelly*, 397 U.S. 254 (1969).

D. TITLE III IS VIOLATIVE OF THE SIXTH AMENDMENT

1. Title III fails to satisfy the Sixth Amendment's requirements of right to counsel. *People v. Escobedo*, 377 U.S. 201 (1964); and *United States v. Massiah*, 377 U.S. 201 (1964).

CONCLUSION

For the reason stated, a Writ of Certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit.

Respectfully Submitted:

OSCAR B. GOODMAN, ESQ.
230 Las Vegas Blvd. South
Las Vegas, Nevada 89101
Telephone: (702) 384-5563
Attorney for Petitioners

CERTIFICATE OF SERVICE BY MAILING

The undersigned hereby certifies that three (3) true and correct copies of the above and foregoing Petition For a Writ of Certiorari to the United States Court of Appeals For the Third Circuit was, on this 10th day of January, 1975, mailed, postage prepaid, to the Honorable Robert Bork, Solicitor General, United States Department of Justice, Washington, D.C. 20530.

Oscar B. Goodman, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA CRIMINAL

V.

GARY ROCCO GARRAMONE, :
ROBERT J. LUMIO,
ALBERT JOSEPH CATALANO, JR., :
EMILIO JOSEPH TRAMONTINA, JR.,
a/k/a "Too-Too" : NO. 73-648

MEMORANDUM AND ORDER

BECHTLE, J. MARCH 4, 1974

The four above-named defendants have been charged in a two-count indictment with violation of various Federal and state laws which prohibit the use of communications facilities in interstate commerce to promote an unlawful gambling or wagering enterprise. Presently before the Court are a series of pretrial motions filed by the defendants. The defendants' motions were the subject of a one-day evidentiary hearing held on February 1, 1974.

Initially, defendants contend that the trial judge should disqualify himself from the trial of this case. The reason advanced in support of this request is that the Court has developed a bias or prejudice against one

or more of the defendants by virtue of the Court's authorization of electronic surveillance on the telephone of defendant Gary Rocco Garramone. Defendants argue that 28 U.S.C. § 144 mandates the Court's disqualification from the trial or any subsequent pretrial proceedings. In substance, 28 U.S.C. § 144 provides that when a party files a sufficient affidavit demonstrating personal bias or prejudice on the part of the judge before whom the matter is pending, the judge shall proceed no further.

The filing of an affidavit of prejudice does not automatically require that the assigned trial judge recuse himself from participation in the case. The defendants' affidavit must be sufficient under the terms of the statute. The essential requirements of an affidavit of bias are outlined in the recent case of *United States v. Thompson*, Criminal No. 72-433 (3rd Cir. 1973). The court therein noted that the affiant has the burden of making a threefold showing: (1) the facts must be material and stated with particularity; (2) the facts must be such that if true they would convince a reasonable man that a bias exists; (3) the facts must show the bias is personal, as opposed to judicial, in nature.

The Court has examined the affidavit submitted by the defendants in this case and has concluded that the averments contained therein are not sufficient under the statute. The facts do not establish any personal bias or prejudice on the part of this Court. A showing of judicial bias is not sufficient to warrant the recusal of the trial judge. The affidavit must establish a bias or prejudice of an extrajudicial origin, a bias that has been acquired outside the four walls of the courtroom.

Adverse judicial rulings or prior judicial exposure to the parties or questions are not sufficient to establish personal bias or prejudice. See, *Lyons v. United States*, 325 F.2d 370 (9th Cir. 1964), *cert. denied* 84 S. Ct. 1650, 377 U.S. 969 (1964); *United States v. Harris*, 458 F.2d 670 (5th Cir. 1972); *Wolfson v. Palmieri*, 396 F.2d 121 (2nd Cir. 1968); *Pynan v. United States*, 376 F.2d 761 (D.C. Cir. 1967); *United States v. Thompson, supra.*

Section 144 contemplates a bias or prejudice stemming from religious, ethnic, sociological, or other similar extrajudicial grounds. The defendants have not presented any facts which would even facially suggest a personal bias or prejudice on the part of the Court. Their reliance on 28 U.S.C. § 144 is, therefore, wholly misplaced.

Defendants have also cited 28 U.S.C. § 47 as additional grounds for the disqualification of the Court. This statute provides that:

> "No judge shall hear or determine an appeal from the decision of a case or issue tried by him."

The above statute is equally inapplicable to the issues presently before us. A pretrial hearing or the trial on the merits does not constitute an "appeal" within the meaning of the statute. Furthermore, the authorization of electronic surveillance is not the case or issue tried by the Court. The "case or issue" language of the statute refers to a final Order of the lower court which may be appealed to a higher court. Defendants have not cited, nor has the Court been able to discover, one case in which a judge was precluded or disqualified from participating in the trial of the case because he had signed an affidavit authorizing the interception of wire

communications. In fact, Local Rule of Criminal Procedure 16(b) specifically directs that any motion attacking the validity of an Order authorizing the interception of a wire communications issued by a judge of this Court shall be heard by that judge. Under the above provision, the particular judge who approves a wiretap Order would hear and decide any motion attacking such Order. To hold that a judge who signed an Order authorizing electronic surveillance must thereafter be disqualified from participating in the case would not only be in direct conflict with Local Rule of Criminal Procedure 16(b) but would suggest that a judge who conducted a full hearing on the motion to suppress evidence must be disqualified from sitting at the actual trial of the case. This court is not disposed to make such an unreasonable and illogical determination.

On November 30, 1972, this Court issued an Order authorizing electronic surveillance over a telephone subscribed to defendant Gary Rocco Garramone. The requisite probable cause to believe that the officer seeking the Order permitting electronic surveillance would obtain evidence of the commission of the offense and that an individual is committing or has committed a particular offense was based in part on information supplied to the affiant by certain confidential informants. The defendants have moved the Court to compel the Government to disclose the names and addresses of the confidential informants.

The Government does not have an absolute duty to disclose the identity of confidential informants. Whether disclosure is required depends on the facts and circumstances of each particular case. Where disclosure

of an informer's identity is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, disclosure will be constitutionally required. *McCray v. Illinois*, 386 U.S. 300 (1967); *Roviaro v. United States*, 353 U.S. 53 (1957).

The defendants have failed to indicate with sufficient preciseness the necessity for the disclosure of the identity of one or more of the informants. No question of possible mistaken identity or the defense of entrapment has been raised here. The informants are not scheduled to testify at trial against the defendants. The identity of the informants that supplied information to law enforcement officials is not relevant to the ultimate issue of the defendants' guilt or innocence of the offense charged.

The Government opposes the defendants' request for disclosure on two grounds. Initially, the Government contends that the informants are currently supplying valuable information in connection with the ongoing investigation of related criminal activity. In addition, it is asserted that the public revelation of the names and addresses of the confidential informants would seriously jeopardize the health and safety of such informants and their families. The Court believes that the interest of the Government in preserving the confidentiality of the informants' identities substantially outweighs the minimal interest of the defendants in full disclosure.

Defendants seek to suppress the contents of the intercepted wire communications on the basis that such evidence was procured in violation of the defendants' rights under the Constitution of the United States. Specifically, defendants claim that the statute under which the Court Order authorizing the interception of

the wire communications was entered is unconstitutional. Title III, Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § § 2510 to 2520, has been repeatedly upheld as constitutional. *United States v. Cafero*, 473 F.2d 489 (3rd Cir. 1973); *U.S. v. Whitaker*, 474 F.2d 1246 (3rd Cir. 1973).

Section 2516 of 18 U.S.C. requires the Attorney General or any specifically designated Assistant Attorney General to authorize an application to a Federal Judge for an Order authorizing the interception of wire or oral communications. Pursuant to the above statute, a special attorney of the Organized Crime and Racketeering Section of the United States Department of Justice responsible for the prosecution of this action submitted an application to the Attorney General of the United States requesting authorization to file an application for a wiretap Order with a Federal Judge. Richard G. Kleindienst, who was the Attorney General of the United States at the time the application was submitted, authorized such application. Defendants now contend that the Attorney General's authorization of special attorney's application was not made in conformity with the provisions of 18 U.S.C. § 2516. The claimed statutory insufficiency consists of the alleged failure of the Attorney General to personally review all relevant information and documentation before authorizing the wiretap application.

Richard G. Kleindienst authorized the application by personally affixing his signature to a document entitled, "Authorization for Interception Order Application." Directly above the Attorney General's signature the following language is found:

"Pursuant to the power conferred on me by Section 2516 of Title 18 U.S.C. I hereby authorize the above-described application . . . "

Defendants claim that § 2516 requires more of the Attorney General than the ministerial task of affixing his signature to the application. It is argued that the term "authorization" embodies a responsibility of personal review on the part of the Attorney General and that the authorization must affirmatively reflect such personal review of the documentation submitted with the application.

According to the relevant provisions of § 2516, the Attorney General must "authorize" an application for a wiretap Order. The statute does not call for an affirmative demonstration on the face of the authorization that the Attorney General personally review the documentation submitted.

With respect to the distinct question of whether the requirement of authorization embodies the responsibility of personal review, there is no indication on the document authorizing the application that Mr. Kleindienst did not in fact review the investigatory file. Reference in the authorizing document to the fact that Henry Petersen, the Assistant Attorney General, recommended authorization to the Attorney General does not constitute evidence that Richard G. Kleindienst did not personally review the application. Absent a substantial evidence to the contrary, the Court must assume that the Attorney General would not affix his signature authorizing an application for a Court Order without first examining the application. Finally, defendants contend that the affidavit did not contain sufficient probable cause to support the Order of the Court

authorizing electronic surveillance. Upon a careful reexamination of the affidavit and in consideration of the testimony elicited during the evidentiary hearing, the Court is convinced that within the four corners of the affidavit there was established probable cause to believe that the interception of communications transmitted over the telephone lines subscribed to by defendant Gary Rocco Garramone would result in obtaining evidence of the commission of violations enumerated in the affidavit. In summary, the Government complied with all of the relevant provisions of 28 U.S.C. § 2510 to § 2520 in obtaining and executing the Court's Order authorizing the interception of wire communications. Accordingly, defendants' motion to suppress the contents of the intercepted telephone communications will be denied.

* * * * * * * * * * * * *

O R D E R

AND NOW, TO WIT, this 4th day of March, 1974, it is hereby

ORDERED that the motion of defendants for disqualification of the trial judge is *denied*;

ORDERED that the motion of defendants to compel the Government to disclose the names and addresses of confidential informants is *denied*;

ORDERED that the motion of defendants to suppress the contents of the intercepted wire communications is *denied*.

LOUIS C. BECHTLE J.

APPENDIX B

JUDGMENT AND ORDER PROBATION (Revised Dec. '66) Cr. Form No. 101

United States District Court

FOR THE

EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v. No. 73-648

GARY ROCCO GARRAMONE

On this 18th day of July , 19 74 , came the attorney for the government and the defendant appeared in person, and by counsel, Oscar B. Goodman, Esquire

IT IS ADJUDGED that the defendant upon his plea of Not Guilty to Counts 1 and 2 and the Court's finding of Guilty as to Counts 1 and 2 has been convicted of the offense of use of interstate facility in aid of racketeering; Gambling and conspiracy, in violation of Title 18, United States Code, Sections 1952 and 371.

as charged in Counts 1 and 2

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED on Count I that the imposition of prison sentence is suspended and the Defendant is placed on probation for a period of THREE (3) YEARS. Defendant to pay a fine in the sum of $2,500.00. A condition of probation is that the defendant pay the fine in full before the commencement of the last 6 months of probation, the first payment to be paid within 60 days from this date. The amount to be paid by the defendant each month shall be determined by the Probation Department. A further condition of probation is that the defendant conform to the rules and regulations of the Probation Department.

Count 2 - The imposition of prison sentence is suspended and the defendant is placed on probation for a period of THREE (3) YEARS TO run concurrent with the term of probation imposed on Count I.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may pre-

scribe. Otherwise the defendant may be brought before the court for a violation of the court's order.

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

A TRUE COPY CERTIFIED TO FROM THE RECORD

DATED: July 18, 1974 Louis C. Bechtle, United States District Judge.

ATTEST: ..... Clerk

DEPUTY CLERK UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

* Insert the words "plea of guilty" or "plea of nolo contendere" or "verdict of guilty" or "finding of guilty" as the case may be. If the defendant has entered a plea of not guilty and has been found guilty by the court or by the jury, insert whether he desires to have counsel assigned by the court and the court has assigned counsel, or whether he desires to have counsel assigned by the court and the court has assigned counsel, or whether he desires to proceed without counsel.

* Insert (1) "guilty" and the court being satisfied that there is a factual basis for the plea, (2) "nolo contendere" and the court being satisfied that there is a factual basis for the plea, (3) "not guilty" and a finding of guilty by the court, or (4) "not guilty" and a verdict of guilty by the jury, as the case may be.

* Insert the count or counts on which the defendant has been convicted.

* If sentence is to run concurrently with any other sentence or sentences, so state, and identify the other sentence or sentences. If sentence is to run consecutively to any other sentence or sentences, so state, and identify the other sentence or sentences. If sentence is to run consecutively to any other sentence or sentences that may be imposed at a later time, so state. If sentence is to run concurrently with any other sentence or sentences that may be imposed at a later time, so state. If sentence is to run concurrently with any sentence or sentences previously imposed by this court, so state, and identify the sentence or sentences. If sentence is to run consecutively to any sentence or sentences previously imposed by this court, so state, and identify the sentence or sentences. If sentence is to run concurrently with any sentence or sentences previously imposed by any other court, so state, and identify the sentence or sentences. If sentence is to run consecutively to any sentence or sentences previously imposed by any other court, so state, and identify the sentence or sentences. If sentence is to run concurrently with any sentence or sentences that may be imposed by any other court at a later time, so state. If sentence is to run consecutively to any sentence or sentences that may be imposed by any other court at a later time, so state. If sentence is to run concurrently with any sentence or sentences previously imposed by this court and with any sentence or sentences previously imposed by any other court, so state, and identify the sentence or sentences. If sentence is to run consecutively to any sentence or sentences previously imposed by this court and with any sentence or sentences previously imposed by any other court, so state, and identify the sentence or sentences. If sentence is to run concurrently with any sentence or sentences that may be imposed by this court at a later time and with any sentence or sentences that may be imposed by any other court at a later time, so state. If sentence is to run consecutively to any sentence or sentences that may be imposed by this court at a later time and with any sentence or sentences that may be imposed by any other court at a later time, so state. If sentence is to run concurrently with any sentence or sentences previously imposed by this court and with any sentence or sentences that may be imposed by any other court at a later time, so state. If sentence is to run consecutively to any sentence or sentences previously imposed by this court and with any sentence or sentences that may be imposed by any other court at a later time, so state. If sentence is to run concurrently with any sentence or sentences that may be imposed by this court at a later time and with any sentence or sentences previously imposed by any other court, so state. If sentence is to run consecutively to any sentence or sentences that may be imposed by this court at a later time and with any sentence or sentences previously imposed by any other court, so state. If sentence is to run concurrently with any sentence or sentences that may be imposed by this court at a later time and with any sentence or sentences that may be imposed by any other court at a later time, so state. If sentence is to run consecutively to any sentence or sentences that may be imposed by this court at a later time and with any sentence or sentences that may be imposed by any other court at a later time, so state.

If sentence is suspended and probation granted, enter here the following: [illegible] defendant is placed on probation for a period of [illegible] years from the date

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JUDGMENT AND ORDER — PROBATION (Revised Dec. '66) — Cr. Form No. 101

United States District Court

FOR THE

EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v. No. 73-648

ROBERT J. LUMIO

On this 18th day of July, 1974, came the attorney for the government and the defendant appeared in person, and by counsel, Oscar B. Goodman, Esquire

IT IS ADJUDGED that the defendant upon his plea of Not Guilty to Count I an the Court's Finding of Guilty as to Count I

has been convicted of the offense of Conspiracy to use Interstate Facility in aid of racketeering and Gambling, in violation of Title 18, United States Code, Section 371

as charged in Count I

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

9 *It Is ADJUDGED on Count I that the imposition of prison sentence is suspended and the* **defendant is placed on probation for a period of TWO (?) YEARS. Defendant shall pay a fine to the United States in the sum of $1,000.00. A condition of probation is that the defendant conform to the rules and regulations of the Probation Department. A further condition of probation is that the defendant shall pay the fine in full before the expiration of one and one-half years of probation and the payments shall commence within 60 days from this date. The amount to be paid by the defendant each month shall be determined by the Probation Department.**

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

LOUIS C. BECHTLE *United States District Judge.*

A TRUE COPY CERTIFIED TO FROM THE RECORD

DATED: July 15, 1954 *Clerk.*

[illegible] [illegible] [illegible] [

JUDGMENT AND ORDER PROBATION (Revised Dec. '66) Cr. Form No. 191

United States District Court

FOR THE

EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v. No. 73-648

ALBERT JOSEPH CATALANO, JR.

On this 18th day of July , 19 74, came the attorney for the government and the defendant appeared in person, and by counsel, Oscar B. Goodman, Esquire

IT IS ADJUDGED that the defendant upon his plea of Not Guilty as to Counts 1 and 2 and the Court's finding of Guilty as to Counts 1 and 2

has been convicted of the offense of Use of Interstate Facility in aid of racketeering; Gambling; Conspiracy, in violation of Title 18, United States Code, Sections 1952 and 371

as charged in Counts 1 and 2

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED on Count I that the imposition of prison sentence is suspended and the Defendant is placed on probation for a period of TWO (2) YEARS. Defendant shall pay a fine to the United States in the sum of $1,000.00. A condition of probation is that the defendant conform to the rules and regulations of the Probation Department. A further condition of probation is that the defendant shall pay the fine in full before the commencement of the last 6 months of the term of probation, the first payment to be made within 60 days from this date. The amount to be paid by the defendant each month shall be determined by the Probation Department.

ON COUNT 2 - The imposition of prison sentence is suspended and the defendant is placed on probation for a period of TWO (2) YEARS, to run concurrent with the term of probation imposed on Count I.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

APPENDIX C

§ 2516. Authorization for interception of wire or oral communications

. (1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from inter-

state shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnaping and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) Any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or

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oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobstrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-849

GARY ROCCO GARRAMONE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners' sole contention is that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the wire interception statute, 18 U.S.C. 2510-2520, is unconstitutional.

On November 14, 1973, petitioners Gary Rocco Garramone, Robert J. Lumio, Albert Joseph Catalano, Jr., and Emilio Joseph Tramontina, Jr., were indicted in the United States District Court for the Eastern District of Pennsylvania. Count I charged all petitioners with conspiracy to use interstate telephone connections to carry on a gambling operation, in violation of 18 U.S.C. 371 and 1952. Count II charged Garramone, Tramontina, and Catalano under 18 U.S.C. 1952 with using interstate telephone connections to carry on a gambling operation in violation of state law. A motion to suppress evidence, including evidence gathered through electronic

surveillance, was denied by the district court (374 F. Supp. 256; Pet. App. A, pp. 3a-10a). After a jury-waived trial on stipulated facts and testimony, petitioners were convicted. Garramone was given a suspended sentence, placed on probation for three years, and fined $2,500. Lumio, Tramontina, and Catalano were each given suspended sentences, placed on probation for two years, and fined $1,000 (Pet. App. B). The court of appeals affirmed (Pet. App. A, pp. 1a-2a).

Petitioners' contend that the wire interception statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510-2520), is unconstitutional. The statute, however, fully satisfies the requirements of precision of affidavit and warrant required by this Court's decisions in *Berger* v. *New York*, 388 U.S. 41, and *Katz* v. *United States*, 389 U.S. 347. And it has been upheld against identical claims by every court of appeals that has considered the issue. See *United States* v. *Falcone*, 505 F.2d 478 (C.A. 3), certiorari denied, February 24, 1975, No. 74-5619; *United States* v. *Martinez*, 498 F.2d 464 (C.A. 6), certiorari denied, December 9, 1974, No. 74-154; *United States* v. *Ramsey*, 503 F.2d 524 (C.A. 7), certiorari denied, February 18, 1975, No. 74-5517; *United States* v. *Cafero*, 473 F.2d 489, 496 (C.A. 3), certiorari denied, 417 U.S. 918; *United States* v. *Tortorello*, 480 F.2d 764, 771-775 (C.A. 2), certiorari denied, 414 U.S. 866; *United States* v. *Cox*, 462 F.2d 1293, 1302-1304 (C.A. 8), certiorari denied, 417 U.S. 918; *United States* v. *Cox*, 449 F.2d 679, 683-687 (C.A. 10), certiorari denied, 406 U.S. 934; *United States* v. *Giordano*, 469 F.2d 522 (C.A. 4), affirmed on other grounds, 416 U.S. 505; *United States* v. *Robinson*, 468 F.2d 189 (C.A. 5), remanded on other grounds, 472 F.2d 973 (*en banc*).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.